IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. 76-1002

VICTOR A. LAHMANN,

Petitioner,

v.

GLEN HAUBROCK, BUILDING COMMISSIONER
and
BOARD OF COUNTY COMMISSIONERS OF
HAMILTON COUNTY, OHIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Petitioner prays that a Writ of Certiorari issue to review the judgment herein of the Supreme Court of Ohio, entered October 22, 1976.

OPINIONS BELOW

The Decision and Judgment Entry of the Court of Common Pleas of Hamilton County, Ohio, affirming in part the order of the Building Commissioner to prevent the use of Petitioner's property for a lawful purpose consistent with a zoning permit, dated February 18, 1975, is printed in Appendix H. hereto attached. This reflects the decision of the Court in Case No.

A-745273, Common Pleas Court of Hamilton County, Ohio, entered March 27, 1975, which is printed in Appendix G. hereto. The Judgment Entry of the Court of Appeals for the First Appellate District of Ohio, under docket No. C-75210, affirming in part and reversing in part the judgment of the Court of Common Pleas of Hamilton County, Ohio, filed July 12, 1976, and the opinion of the said Court of Appeals, filed May 17, 1976, are printed in appendices D. and E., respectively, attached hereto. The entry of the Court of Appeals for the First Appellate District of Ohio, overruling Petitioner's application for rehearing, is printed in Appendix C. hereto. The entry of the Supreme Court of Ohio, dated October 22, 1976, dismissing the motion of Petitioner for an order directing the Court of Appeals to certify its record is printed in Appendix B., attached hereto.

That portion of the assignments of errors filed in the Court of Appeals for the First Appellate District of Hamilton County, Ohio, raising the constitutional questions is printed in Appendix J., attached hereto.

Proposition of Law No. 1, contained in the argument in the brief presented to the Supreme Court of Ohio, raising the constitutional question is printed in part as Appendix L., attached hereto. The raising of the constitutional question in the appeal to the Court of Common Pleas of Hamilton County, Ohio, and to the Board of Zoning Appeals of Hamilton County, Ohio, are printed as Appendices M. and N. respectively, attached hereto.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3). Rule 19 (1) of the Rules of the Supreme Court of the United States provides:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or had decided it in a way probably not in accord with applicable decisions of this court."

QUESTIONS PRESENTED FOR REVIEW

May a state court refuse to apply the doctrine of *res adjudicata* in litigation involving the same parties and permit the Building Commissioner of Hamilton County, Ohio, and the Board of County Commissioners to deprive Petitioners of the rightful and lawful use of their property for a purpose and for a business which the state court had previously determined at the highest appellate level the Petitioner was entitled to, particularly where the Court of Appeals had in the previous decision ordered the issuance to Petitioner of a non-conforming use certificate for the entire 4.81 acres of property, – where the certificate was issued, and where the only business being conducted by Petitioner on his property at the time in question was the business for which he held a non-conforming use certificate?

May a State, through its officials, take away from a private citizen the right to hold his property inviolate after the highest court, to which the case was submitted, in a prior proceeding *involving the same parties,* had ruled that Pe-

titioner was entitled to make the use of his property which he would now be deprived of if this Court did not intervene?

Is Petitioner being denied the right to Equal Protection and Due Process of Law guaranteed by the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the Constitution of the United States, Section 1, has been violated by the state officials and by the courts of the State of Ohio.

STATEMENT OF THE CASE AND FACTS

Petitioner owns 4.81 acres of land and improvements thereon at 8100 Cheviot Road, Hamilton County, Ohio, subject to a non-conforming use certificate that permits Petitioner to sell buses at retail, even though the property was zoned residence "B". This non-conforming use certificate was issued December 20, 1973, *for the entire acreage* by order of the Court of Appeals for the First Appellate District of Ohio. This order was not appealed and the Building Commissioner issued the certificate. The Court ruled that Petitioner could change from one Retail "E" business (nursery operation and sales) to another Retail "E" business (sale of buses). No restrictions on land area uses were imposed upon the certificate. It covered the entire 4.81 acres.

Shortly after reluctantly issuing this non-conforming zoning certificate by court order, the Building Commissioner started the present proceedings in a collateral attack on a final judgment of the Court of Appeals, attempting to interfere with Petitioner's right to use his property for a valid and lawful purpose, making the following order on March 21, 1974:

> "You are hereby ordered to cease the parking of vehicles on the newly constructed parking area immediately; and remove the gravel/rock surfacing of the newly constructed parking area and restore the original grass surface as is practical by May 1, 1974."

This order was appealed to the Board of Zoning Appeals which affirmed. It was then appealed to the Common Pleas Court of Hamilton County, Ohio, which found that the Commissioner had no right to order the restoration of the grass surface. It was then appealed to the Court of Appeals, which held also that the Commissioner had no authority to order the removal of the gravel and the rock surfacing. The Court of Appeals affirmed that part of the order which prohibited Petitioner parking vehicles on the newly constructed parking areas.

That order not only precludes Petitioner from parking his inventory of buses on the newly constructed gravel area, but prohibits him from parking his personal automobile or any other vehicle on the gravel area adjacent to his residence, which is also located on the 4.81 acres. The Building Commissioner admitted he had no authority to control the construction of parking areas or to require a permit for the parking of vehicles. He claimed the loose gravel was a "structure" and that he could order it removed.

The Commissioner testified that Petitioner could park his buses on the grass, but denied that Petitioner could place loose gravel over the grass because that was a structure. At no time did the Commissioner claim or contend that parking of buses on the grassy area would be a use not permitted by the non-conforming use certificate which admittedly covered the entire 4.81 acres. This graveled area comprises less than 1/7th of the total acreage and is located in the middle of the tract, with substantial trees and evergreens surrounding and shielding the entire tract.

It was not until the decision by the Court of Common Pleas that a theory was injected into the case that somehow the first judgment did not give the right to sell or park buses being offered for sale on this particular area. There was

not only no evidence in the case that would in any way have permitted the conclusion by the Common Pleas Court that the previous owner in his prior non-conforming business had not used this area, but the only testimony established that the previous owner had used the entire acreage for his non-conforming business. This issue was injected for the first time by the Common Pleas Court, despite the fact that any burden of proof on that issue would have rested under Ohio law upon the Building Commissioner, who offered no evidence whatsoever on that point because it was not an issue.

At that point, the error of the Court in refusing to apply the doctrine of res adjudicata was raised but a motion for rehearing was overruled. Similarly, the issue of res adjudicata was raised in the Court of Appeals which did not even comment upon it in its decision, other than to state that it was overruling the assignments of error which raised this point and the constitutional questions.

The Supreme Court of Ohio denied Petitioner's motion to certify, even though the Court was advised in brief that this present ruling, if not reversed, deprives Petitioner of the right to use his property for lawful purposes (whether it be a non-conforming business use or his own personal residential use) and violates his rights under the Fourteenth Amendment. Since there is nothing in the zoning resolution to restrict or prevent the parking of vehicles (whether for business or personal) on this property, the ruling of the Court, unless reversed by this Court, deprives Petitioner of the equal protection of the law. These points were raised in the Board of Zoning Appeals, the Court of Common Pleas, the Court of Appeals, and also presented to the Supreme Court of Ohio which, without an opinion, dismissed the motion to certify.

The order appealed from had three parts: Part 3 (restore sod and grass) was found to be illegal by the Common Pleas Court; part 2 (remove the gravel and rock) and also part 3 were found by the Court of Appeals to be illegal. In determining that the Commissioner had no authority to order a

private citizen to remove his gravel and restore grass, the Court not only agreed with Petitioner's claim that such action was unconstitutional and deprived Petitioner of property without due process of law and denied him the equal protection of laws, but the Court found the loose gravel and rock was not a "structure" as defined in the zoning resolution.

Once the Court of Appeals determined that gravel is not a "structure," the Court should have reversed the Commissioner entirely. While the Commissioner had power to order the removal of a "structure", he had attempted in this case to order the removal of something that has now been judicially declared *not* a "structure". Therefore, he could no more order the removal of vehicles than he could order the removal of loose gravel. Neither is a "structure".

The denial of due process of law and the equal protection of the laws to this Petitioner is so blatant in this case that it is difficult to understand why the Supreme Court of Ohio denied the motion to certify. Petitioner was forced into the present litigation with property rights that had been given him by the Court of Appeals, which ordered the issuance to him of a non-conforming use certificate *for the entire tract.* The court of Appeals in deciding the prior case clearly recognized that the prior owner had used the entire tract and that the certificate which it ordered issued for a non-confroming business use *covered the entire tract.* We quote the following from that Court's decision, printed as Appendix M. herein attached:

> "In 1971, the appellee, Victor A. Lahmann, *acquired nearly five acres* of improved real estate in Hamilton County, intending to use such premises in the sale of school buses. *The prior owner had used* the premises for many years . . . ."

In reaching the conclusion that is appealed from, the Court of Appeals and the Supreme Court of Ohio disregarded a clear pronouncement of the United States Supreme Court that res adjudicata must be applied in subsequent proceedings

involving the same parties and the same issues. The *parties here are the same* as in the successful action that Petitioner had pursued through the courts, and *the issue is the same.*

THE REASONS FOR GRANTING THE WRIT

The Supreme Court of Ohio's dismissal of the motion to certify the record from the Court of Appeals for the First Appellate District of Ohio with respect to that part of the Court's order that the Building Commissioner could prevent Petitioner from parking his authorized inventory of buses on the central portion of a 4.81 acre tract for which a non-conforming certificate had been issued pursuant to prior Court order is a mockery of justice and violates Petitioner's Fourteenth Amendment rights:

1. It is in conflict with the decisions of this Court that recognized the right of a litigant to rely upon res adjudicata in a subsequent action between that litigant and the same parties relative to the same issues, and particularly in conflict with the pronouncement by this Court in *Hertz* v. *Woodman*, 218 U.S. 205, as well as the applicable law of the State of Ohio on that subject.

2. In the prior case the Commissioner had held *no part* of the 4.81 acres could be used for business; the Court of Appeals then ruled that *all* of the 4.81 acres could be used for business and ordered a certificate to issue. Now, the Commissioner and the Courts of Ohio would limit the business use to a small area, contrary to the ruling in the first case and in violation of Petitioner's unrevoked zoning certificate.

3. Petitioner has his certificate for a non-conforming usage of the entire parcel, but the order of the Building Commissioner (as condoned in one small part by the courts of the State of Ohio) would effectively negate the victory achieved by Petitioner in the prior adjudication of his rights. Unless reversed, this order would effectively deprive Petitioner of the

right to use his property to its full extent and to its full value, and take same from him unconstitutionally by collateral attack on a valid judgment. To permit the Building Commissioner to take away from the Petitioner a right which he had once before unsuccessfully denied the Petitioner, violates the fundamental principle of equal protection and constitutes the taking of property without meaningful due process of law.

4. It effectively deprives the Petitioner of his right to equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

5. What value is there in a judgment if the courts will permit an official of the State to disregard same and take away Petitioner's property rights, or diminishes property rights, by relitigating the same issue that had been decided in favor of Petitioner by the highest court of the State to which the Building Commissioner had appealed the action? (The Building Commissioner is the agent of and acts for the Board of County Commissioners, and is appointed by them under the zoning resolution involved in this case.)

6. Petitioner, a citizen, has been and will be permanently deprived of his property right by the unconstitutional action of a state agent and the obvious error of the Appellate Courts in the State of Ohio, unless this Court, as the champion of the constitutional rights of all citizens intervenes to protect this one individual. What has happened to Petitioner in this case could and may happen to other citizens, unless this Court by its action makes it clear to the officials in Ohio and to the State Courts that the doctrine of res adjudicata applies equally to all litigants, and that a citizen, who is denied property rights by the refusal of State officials and State Courts to recognize his rights to rely upon the doctrine of res adjudicata, has sustained a violation of his rights under the Fourteenth Amendment to equal protection of the law and his right not to be deprived of his property or his business without due process of law.

Only this Court can save this Petitioner from the type of abuse by State action which the Fourteenth Amendment of the Constitution was intended to eliminate. Although this case involves only one parcel and one citizen, this Court is urged, as a protector of all citizens from oppressive State action, to review this matter not only for the benefit of this Petitioner, but to make it clear to officials of all of the States that similar action will be regarded as a violation of Fourteenth Amendment rights of citizens of the United States.

ARGUMENT

Petitioner owns valuable business property because it possesses a non-conforming use certificate to operate his business for the retail sale of buses (or it can be changed to any other Retrail "E" business under the zoning regulations). *This certificate, ordered by a prior final judgment* in the Court of Appeals, is not limited to any part of the 4.81 acres, but *covers the entire property.*

With that property right confirmed by the Court of Appeals in the prior case, Petitioner put gravel on a portion of his property to store his inventory of buses on the graveled surface rather than on grass. *The latest action of the second Court of Appeals,* affirming in one small part the action of the Building Commissioner, *denies* Petitioner the *right to use all of his property* for the conduct of his business, even though he holds an unlimited and unrestricted non-conforming use certificate for the entire property.

Moreover, the Building Commissioner's denial of Petitioner's right to park his own automobiles on his own private property (which is adjacent to his residence) and the right to park or display part of his inventory takes his property without due process of law. The Building Commissioner did not claim in any way that this gravel constituted a nuisance or interfered with the adjoining property owners; to the contrary, the Commissioner found such not to be the case. All he is determined

to do in this second case is to frustrate Petitioner and circumvent the clear decision of the first case.

Petitioner had a right to rely upon the finality of the prior judicial proceedings which confirmed his right to operate any Retail "E" type business on the entire acreage and to insist upon the State honoring for all of the acreage the integrity and validity of the non-conforming use certificate which the State had issued by order of the Courts in the prior case.

This Court has recognized on many occasions that litigants are entitled to know what their rights are as set out by judicial precedent, and, having relied thereon in conducting their affairs, they should not have their rights done away with by judicial fiat. *Hertz* v. *Woodman,* 218 U.S. 205.

The right to a defense arising from *res judicata* is a vested right of which one cannot be deprived without a violation of constitutional guarantees. *People* v. *Prather,* 343 Ill. 443. This precept of law is the same as that recognized in *Hertz* v. *Woodman.*

Although there are many defenses in which parties have no vested right, there are some defenses which are clearly substantial and of which a party cannot be deprived. *The defense of res judicata is such a defense.* This is recognized generally throughout the United States as well as by this Court. *Hertz* v. *Woodman.*

In *Partmar Corp.* v. *Paramount Corp.,* 347 U.S. 89, rehearing denied 347 U.S. 931, this Court recognized that a prior determination of a fact or of a law question is determinative in a second proceeding involving the same fact of law question.

In the *United States* v. *Moser,* 266 U.S. 236, 242, this Court said:

> . . . But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law."

See also *Emich Motors* v. *General Motors Corp.,* 340 U.S. 558, 569.

This latest holding of the Court of Appeals would, if permitted to stand, subject this Petitioner to an unequal treatment of the law in violation of his constitutional rights. There is nothing in the zoning resolution which permits the Building Commissioner to do what he has done.

The Building Commissioner admitted that this property was zoned for "the retail sale of buses" and that a valid certificate was in existence. Petitioner's testimony was uncontradicted that all of the buses on the graveled area at the time in question were for sale in the ordinary course of his business, and that the automobiles or other vehicles were used by him in the conduct of his business or were automobiles belonging to him, his family, his business invitees and/or guests.

Even though the Building Commissioner admitted in the record that no permit was required for any parking area or for the grading and/or installation of gravel thereon, the Court of Appeals' decision denies Petitioner the right to even park his own automobile in the area in question.

The Court of Appeals recognized the unconstitutional character of the Building Commissioner's action in ordering the removal of the gravel and restoration of grass, but would permit the Building Commissioner to take away valuable property rights of this Petitioner to use *all* his property.

If Petitioner's property was actually zoned as Retail "E" and he was operating a Retail "E" business thereon, the Commissioner could not prevent the parking of vehicles or display of buses on any of the real estate. The same rights exist in this case where the entire tract is the subject of a non-conforming use certificate that permits the operation of a Retail "E" business: the retail sale of buses. This right extends to all of the four corners of the parcel of land.

Under the guise of a zoning regulation, the Court of Appeals would permit the Commissioner to deny a citizen the right to park his own automobiles or his business inventory on a portion of his property, even though that area is protected by a non-conforming use certificate, even though the activity is clearly and completely within the limits of the non-conforming use certificate, and even though the Court of Appeals has determined that the Petitioner cannot be required to remove gravel that he has placed upon his property.

The entire position of the Board of Zoning Appeals and the Court of Common Pleas was based upon a theory that the installation of the gravel was the installation of a "structure" and that the Court had authority to order the removal of the gravel because it was a "structure" under Sec. 31.34 of the Zoning Resolution.

Under the zoning resolution a permit was required to make a structural change, but not for any other activity in connection with the operation of a non-conforming use business. The Commissioner had claimed that the installation of gravel was a "structure" and a "structural change" and that this could not be done without an additional permit. The concept that loose gravel could be a "structure" was reversed by the Court of Appeals in this second case.

Both the Commissioner and the Court of Common Pleas had based their conclusions upon the false premise that the installation of the new gravel area without a permit was the violation of the Zoning Resolution and could be ordered removed. When the Court of Appeals pulled this foundation out from under the Building Commissioner and the Court of Common Pleas, the Court of Appeals should promptly and immediately have ruled that Petitioner had a right to use all of his property for the non-conforming use that he was authorized to conduct, and that it mattered not that he had installed some gravel where grass had previously been.

This Court in *Euclid* v. *Ambler Co.*, 272 U.S. 365, recognized that a zoning ordinance is unreasonable if it frustrates the owner in the use of his property. In the instant case, the application of the zoning ordinance in the face of the prior judicial decision not only frustrates the Petitioner in the use of his property, but it renders the property unsuitable for its reasonable economic productivity of a business nature. In addition, it affects adversely the operation of his business as well as depreciates the value of his land.

The Supreme Court of Ohio in *Columbus* v. *Cemetery Association*, 45 Ohio St. 2d 47, held that "in the absence of fraud or collusion, a point of law or a fact which was actually and directly an issue in a former action, and was there passed upon and determined by a Court of competent jurisdiction, may not be drawn in question in a subsequent action between the same parties or their privies".

The Supreme Court of Ohio cited and relied upon the United States Supreme Court cases of *U.S.* v. *Texas*, 162 U.S. 1, and *Oklahoma* v. *Texas*, 256 U.S. 70, as authority for the proposition that the Supreme Court of the United States also recognizes the determination in the former suit as determinative of any subsequent proceedings.

As this Court stated at page 93 of *Oklahoma* v. *Texas*:

> "The matter being *res judicata*, as the result of the decree in the former suit, it is of no consequence whether it was correctly decided or not."

In the instant case, the Supreme Court of Ohio has ignored completely the doctrine of *res judicata* and has permitted the destruction of a property right of the Petitioner. This violates Petitioner's Fourteenth Amendment rights, as recognized by this Court in every case where that question has been presented.

Due process of law is the primary and indispensable foundation of individual freedom; it is the basic and essential term in the social compact which defines the rights of an individual and delimits the powers which the State may exercise. *Re Application of Gault*, 387 U.S. 1.

Only by granting this Writ of Certiorari can the Court rule that a State Court has decided this case "in a way probably not in accord with applicable decisions of this Court", as set forth in Rule 19 (1)(a) of the rules of the Supreme Court of the United States.

CONCLUSION

The instant case presents a clear example of the refusal of the State Courts, including the Supreme Court of Ohio, to follow the basic precepts of law set down by this Court in many cases, including *Hertz* v. *Woodman*, *Partmar Corp.* v. *Paramount Corp.*, *Oklahoma* v. *Texas*, and *U.S.* v. *Moser*.

In all of these cases, this Court has recognized that *res judicata* is an absolute defense that a litigant is entitled to, and that the denial of same to take away his property is a violation of his due process rights under the Fourteenth Amendment. The instant case gives this Court a clear opportunity to not only reaffirm its position, but to make it clear to the State of Ohio and to any other states that might attempt to do the same thing, that a denial of the defense of *res judicata* is a violation of the rights of the Petitioner and other citizens under the Fourteenth Amendment.

Since the Courts of Ohio have apparently been willing to cite the Supreme Court of the United States (*Oklahoma* v. *Texas*, cited in the Supreme Court of Ohio case of *Columbus* v. *Cemetery Association*) this Court now has the opportunity to advise the Supreme Court of Ohio and other Courts of the various states that not only is the adjudication of the first case final and determinative (even if it was erroneous), but that a failure of the Courts of the States to recognize this precept of law violates the Fourteenth Amendment to the Constitution of the United States. For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

COURT OF APPEALS
FIRST APPELLATE DISTRICT

NO. C-75210

IN RE APPEAL OF VICTOR A. LAHMANN,
Plaintiff-Appellant,

vs.

GLEN HAUBROCK
BUILDING COMMISSIONER

and

BOARD OF COUNTY COMMISSIONERS
OF HAMILTON COUNTY, OHIO,
Defendants-Appellees.

NOTICE OF APPEAL

(Filed August 10, 1976)

The plaintiff-appellant hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Court of Appeals of Hamilton County, Ohio, First Appellate District entered herein on July 12, 1976, affirming in part and reversing in part a judgment entered by the Court of Common Pleas of Hamilton County, Ohio.

This appeal is from that portion of the said judgment which ordered plaintiff-appellant to "cease parking of vehicles on the newly constructed parking area immediately," which order not only denied plaintiff-appellant the right to park his own private and personal automobiles on his residence and business

property, but denied him the right to park and display school buses for sale, despite the fact that plaintiff-appellant has been and is presently the holder of a non-conforming use certificate to permit the sale at retail of school buses upon the premises from which plaintiff-appellant has been ordered to remove them and to "cease parking" them.

/s/ ROBERT F. DREIDAME
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APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

1976 TERM

To wit: October 22, 1976

No. 76-1025

THE STATE OF OHIO,)
)
City of Columbus.)

VICTOR A. LAHMANN,

Appellant,

vs.

GLEN HAUBROCK,
BUILDING COMMISSIONER, ET AL.,

Appellees.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR HAMILTON COUNTY TO CERTIFY ITS RECORD

(Filed ————————)

It is ordered by the Court that this motion is overruled.

COSTS:
Motion Fee, $20.00, paid by Lindhorst & Dreidame

(DULY CERTIFIED)

APPENDIX C

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

CASE NO. C-75210

IN RE: APPEAL OF VICTOR A. LAHMANN,
Appellant,

vs.

GLEN HAUBROCK,
BUILDING COMMISSIONER
and
BOARD OF COUNTY COMMISSIONERS
OF HAMILTON COUNTY, OHIO,
Appellees.

ENTRY OVERRULING APPLICATION FOR RECONSIDERATION

(Filed July 12, 1976)

This cause came on to be heard by the Court upon the application of the appellant for reconsideration of the opinion announced by this Court on June 4, 1976, and upon the memorandum in opposition thereto, and

The Court, being fully advised in the premises, finds that said application is not well taken and that the same ought to be, and hereby is, overruled.

/s/ JOHN J. GRIESINGER
Presiding Judge

APPENDIX D

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

NO. C-75210

IN RE APPEAL OF VICTOR A. LAHMANN,
Plaintiff-Appellant,

vs.

GLEN HAUBROCK,
BUILDING COMMISSIONER
and
BOARD OF COUNTY COMMISSIONERS
OF HAMILTON COUNTY, OHIO,
Defendant-Appellee.

JUDGMENT ENTRY

(Filed July 12, 1976)

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken except as to the removal of gravel and rock, in which respect it is reversed and remanded for further proceedings in accordance with the law, consistent with this decision.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To the Clerk:
Enter upon the journal of the court.

/s/ JOHN J. GRIESINGER
Presiding Judge

APPENDIX E

IN THE COURT OF APPEALS FOR
HAMILTON COUNTY, OHIO

No. C-75210

IN RE APPEAL OF VICTOR A. LAHMANN,
Plaintiff-Appellant,

vs.

GLEN HAUBROCK,
BUILDING COMMISSIONER

and

BOARD OF COUNTY COMMISSIONERS
OF HAMILTON COUNTY, OHIO,
Defendant-Appellee.

DECISION

(Filed May 17, 1976)

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JOHN J. GRIESINGER, J.: Sitting by Assignment.

This is an appeal from a judgment of the Court of Common Pleas of Hamilton County, Ohio, affirming the Order of the Board of Zoning Appeals in the above-entitled case.

The appellant's predecessor in title owned the five acre tract of land in question, most of which was in grass and a small portion of which was devoted to the retail sale of nursery products. The prior owner used the premises for many years in part for his residence and in part in operating a retail nursery business in which he sold a few trees, shrubs, plants and various nursery products. His retail business was neither intensive nor extensive.

Subsequently, the tract was zoned within a "B" Residence District. It is undisputed that this retail nursery business was an authorized non-conforming use under the Zoning Resolution, it being a retail "E" operation within the meaning of the Zoning Resolution. This was observed by the prior ruling in the previous case by the Court of Appeals.

On or about April 18, 1972, the appellant Lahmann, who had purchased the property, made an application to the Building Commissioner for a permit to use the property for "Retail Sale of Buses" and "Erection of Sign on Building". The application was denied by both the Building Commissioner and the County Board of Zoning Appeals. Said authorities were thereafter reversed by the Common Pleas Court (Judge Black).

The Board of Zoning Appeals prosecuted an appeal to the Court of Appeals of the Hamilton County (Case No. C-73321 and C-73323). The Court of Appeals observed that Lahmann succeeded to the same rights as the prior owner and could

have augmented his sales but, it is to be noted, the Court of Appeals was silent on the question of whether the business could be extended over more of the five acres than was presently used for said retail sale purposes.

Thus arises the question that was presented to the Board of Zoning Appeals and the Common Pleas Court in the present case. Pursuant to the mandate of the Court of Appeals in the first case a Non-Conforming Certificate was issued to Lahmann for the "use of retail sales of buses".

About forty-five (45) days after the Court of Appeals' decision, Lahmann began the construction of a new gravel parking lot in the southerly portion of the land. The new construction increased the parking area to a size of more than ten times the size of the parking area which existed at the time Lahmann acquired the property.

In the construction of the new parking facility, considerable grading took place and the parking area was covered with stone and gravel. The new parking facility was large enough to accommodate many more buses than the parking area would have provided at the time of the original case.

The Building Commissioner and the Zoning Board denied the appellant's right to said newly constructed parking area. The Building Commissioner made the following order in respect of said real estate:

> "You are hereby ordered to cease parking of vehicles on the newly constructed parking area immediately; to remove the gravel/rock surfacing of the newly constructed parking area and to restore the original grass surface as is practical by May 1, 1974."

An appeal from this order was timely taken to the Board of Zoning Appeals, who affirmed the action of the Building Commissioner and denied the appeal of the appellant. A timely notice of the appeal from the ruling of the Zoning Board of Appeals was filed in the Common Pleas Court which rendered an Opinion affirming the action of the Building Commissioner except as to the language restoring the original grass surface.

The appeal was prosecuted to this Court. Judge Black, in the case now before the Court of Appeals in his Opinion stated: "The question now is how far the owner of a non-conforming use may go in extending or intensifying that use." Section 151 of the Hamilton County Zoning Resolution provides in part as follows:

> "The lawful use of any • • • land or premises as existing and lawful at the time of the enactment of this Resolution • • • may be continued although such does not conform with the provisions of the Resolution • • • Whenever a non-conforming use has been changed to a more restricted use or to a conforming use, such shall not thereafter be changed to a less restricted use."

There seems to be no doubt that the appellant could continue to operate the nonconforming use for retail sales of buses on the part of the land that was used by his predecessor for retail sales before the adoption of the Zoning ordinance.

The question remains whether that could be extended.

Section 154

> "Except as hereinafter provided • • • no premises devoted to a use not permitted by this Resolution in the District in which such • • • premises is located shall be enlarged, extended and • • • unless the use thereof is changed to a use permitted in the District in which such • • • premises is located."

This section prohibits the premises being enlarged or extended. Does Lahmann in the instant case seek such a privilege?

In the previous case, Lahmann sought no such privilege.

In the instant case, he does.

In the present case, we are faced with an extreme enlargement or extension of the parking area that was in use at the time Lahmann purchased the property and at the time of the previous Court of Appeals' decision and mandate to issue a nonconforming certificate for the use of property for the

sale at retail of buses. The present parking area is not within the limitations set down by the Court of Appeals in the previous case. Judge Black, in the present case, held that the use of the new construction for parking is a violation of the Zoning Resolution and that the enlargement can be prevented and enjoined and with this, this Court agrees.

58 O. Jur. 2nd, Sec. 63:

However, the gravel and rock surfacing is not a structure as defined in Section 31.45 of the Zoning Resolution and, therefore, the Court had no authority to order its removal and, with the Court's ruling in this respect, we disagree. We do agree, however, with the ruling of the Court that the Building Commissioner and the Board had no authority to order the grass to be replanted in the parking area. Therefore, the ruling of Judge Black in the second case is affirmed as to part and overruled as to part, as indicated.

There are several assignments of error.

Each assignment of error was reviewed by the Court, and, upon review, the following disposition thereof is made:

> *Assignment of Error No. 1*: The Court of Common Pleas erred in affirming, even in part, the Resolution of the Board of Zoning Appeals dated July 3, 1974.

As to what has already been said in the foregoing Opinion of this Court, the Court finds that the Common Pleas Court did not err except as to ordering the removal of the gravel and rock and the replanting of the grass.

> *Assignment of Error No. 2*: The Court of Common Pleas erred in determining that the Building Commissioner could order appellant "to cease the parking of vehicles on the newly constructed parking area immediately", where this was on private property and was being used only for a use authorized by a Zoning Certificate.

The Court of Common Pleas did not err in determining that the Building Commissioner could order the appellant

to cease parking vehicles on the newly constructed parking area immediately, as has been already determined in the foregoing Opinion of this Court.

> *Assignment of Error No. 3*: The Court of Common Pleas erred in determining that the Building Commissioner could order appellant to "remove the gravel/rock surface of this newly constructed parking area", where this was on private property and was being used only for use authorized by the Zoning Certificate.

As to the removal of the gravel/rock surfacing, the Court has already ruled that the Common Pleas Court erred but otherwise, as to this Assignment of Error, the Court finds that the Common Pleas Court did not err, as set forth in the Opinion of the Court.

> *Assignment of Error No. 4*: The Court of Common Pleas erred in determining that the placing of loose stone and gravel upon the surface of appellant's land was a "structure" within the meaning of Section 31.44 of the Zoning Resolution governing the zoning of the area in question, and refusing to follow the decision of the same Court of Common Pleas in Case No. A-725570, and in ignoring completely and refusing to follow the clear pronouncement of the Court of Appeals in a previous case involving the same parties, which bore the numbers C-73321 and C-73323 in the Court of Appeals of Hamilton County, Ohio, which decision was rendered by a visiting Court of Appeals.

The ruling on this assignment of error is the same as contained in Assignment of Error #3.

Assignment of Error No. 5: This is covered in the ruling of Assignment of Error No. 4.

Assignment of Error No. 6: The Court finds no error in Assignment of Error No. 6 in that there was no structure or building involved and, therefore, no permit was required.

Assignment of Error No. 7: The Court finds that under the circumstances and the ruling of the Court in this case that there was no prejudice herein involved, as to Assignment of Error No. 7.

Assignment of Error No. 8: The Court finds no error in the ruling of the Court below on Assignment of Error No. 8, as set forth in the foregoing Opinion of this Court.

Assignment of Error No. 9: This Court finds that there was no error in that the Court did not attempt to legislate as claimed.

Assignment of Error No. 10: The Court did not err in respect to Assignment of Error No. 10, as set forth in the foregoing Opinion.

Assignment of Error No. 11: The Court of Common Pleas did not err in this respect as set forth and previously observed that no building or structure was involved and no building permit required.

Assignment of Error No. 12: The Court below did not err in this respect. No such approval was required.

Assignment of Error No. 13: The Court did not err in respect to the error claimed in Assignment of Error No. 13. 58 O.Jur.2d Section 29:

> "Zoning Regulations are adopted and enforced pursuant to police power under which government may enact in the furtherance of public safety, health, morals, or general welfare."

58 O.Jur.2d, Section 33, page 506:

> "The constitutionality of comprehensive zoning was established by the Supreme Court of the United States in Euclid v. Ambler Realty Company, a case which originated in Ohio." *Euclid* v. *Ambler*, 272 U.S. 365.

Assignment of Error No. 14: The Court did not err in re-

gard to Assignment of Error No. 14. The same reasons as given under Assignment of Error No. 13 apply.

Assignment of Error No. 15: The Court finds no error in regard to Assignment of Error No. 15; the same authorities as cited in Assignment of Error Nos. 13 and 14 are applicable.

Assignment of Error No. 16: The Court did not err in Assignment of Error No. 16. This Court finds that the action of the Common Pleas Court in affirming the Board of Zoning Appeals is supported by evidence and is not contrary to the weight of the evidence.

58 O. Jur., Section 178, page 633:

> "In the absence of evidence that the decision was an abuse of discretion or an act in excess of the power of the board or was unreasonable after all the circumstances, the Board's decision will be upheld."

We find that the Board's decision should be upheld.

Assignment of Error No. 17: The Court finds no error in Assignment of Error No. 17 and that the action of the Common Pleas Court in affirming the ruling of the Board of Zoning Appeals is not contrary to law.

REILLY, J., AND DAHLING, J., CONCUR.

GRIESINGER, P. J., RETIRED, AND ASSIGNED TO ACTIVE DUTY UNDER AUTHORITY OF SECTION 6(C), ARTICLE IV, CONSTITUTION.

REILLY, J., OF THE TENTH APPELLATE DISTRICT, AND DAHLING, J., OF THE ELEVENTH APPELLATE DISTRICT, SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

PLEASE NOTE:

The Court will place of record its own entry in this case ten (10) days following the release of this Decision.

APPENDIX F

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

NO. A-745273
(Appeal No. 6-74)

IN RE APPEAL OF VICTOR A. LAHMANN,
Appellant,

vs.

GLEN HAUBROCK,
BUILDING COMMISSIONER
and
BOARD OF COUNTY COMMISSIONERS
OF HAMILTON COUNTY, OHIO,
Appellees.

NOTICE OF APPEAL

(Filed April 23, 1975)

Notice is hereby given that Victor A. Lahmann, appellant, hereby appeals to the Court of Appeals of Hamilton County, Ohio, First Appellate District of Ohio, from the final order affirming the order of the Building Commissioner, except as modified, which order of affirmance was entered in this action on the 27th day of March, 1975.

/s/ ROBERT F. DREIDAME
LINDHORST & DREIDAME
Attorneys for Appellant,
Victor A. Lahmann
1200 American Building
Cincinnati, Ohio 45202
421-6630

I have this day mailed a copy of the foregoing notice of appeal to Robert W. Worth and Raymond H. Hensley, counsel for defendants-appellees by mailing same to their office addresses.

/s/ ROBERT F. DREIDAME
Attorney at Law

APPENDIX G

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

NO. A-745273
(Appeal No. 6-74)

IN RE APPEAL OF VICTOR A. LAHMANN,
Appellant,

vs.

GLEN HAUBROCK,
BUILDING COMMISSIONER

and

BOARD OF COUNTY COMMISSIONERS
OF HAMILTON COUNTY, OHIO,
Appellees.

JUDGMENT ENTRY
(Filed March 27, 1975)

This cause came on to be heard upon the appeal of Victor A. Lahmann (hereinafter called appellant) from a final order of the County Board of Zoning Appeals of Hamilton County, and said appeal was submitted to the Court on the transcript

of the proceedings before said Board, and the arguments of counsel, including counsel for intervenors herein.

The Court, having fully considered the evidence, the briefs of counsel, and oral argument of counsel, finds that the decision of the Hamilton County Board of Zoning Appeals as set forth in its resolution of July 3, 1974, is constitutional, legal, not arbitrary, not capricious, and is reasonable and supported by the preponderance of substantial, reliable and probative evidence on the whole record, with one exception. This exception is that part of the resolution which requires appellant (Lahmann) to restore "the original grass surface (so far) as is practicable," and it is the judgment of the Court that this part of the order is illegal in that it goes beyond the authority and power granted to the Building Commissioner under the Zoning Resolution.

Accordingly, the Court modifies the decision of the Board so that it shall read that the order of the Building Commissioner be and hereby is affirmed with the exception that the appellant and owners herein shall not be required to restore the original grass surface. This cause is remanded to the Board with instructions to enter an order consistent with the findings of this Court. Exceptions are reserved as the parties may elect.

/s/ ROBERT A. BLACK
Judge

LINDHORST & DREIDAME
BY: /s/ ROBERT F. DREIDAME
Attorneys for Appellant

HAMILTON COUNTY PROSECUTOR
BY: /s/ ROBERT WORTH
Attorneys for Appellees,
Building Commissioner and
Board of County Commissioners

WEBER, HENSLEY & NURRE
BY: /s/ RAYMOND HENSLEY
Attorneys for Intervenors

APPENDIX H

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-745273

IN RE APPEAL OF VICTOR A. LAHMANN,
Appellant,

vs.

GLEN HAUBROCK,
BUILDING COMMISSIONER

and

BOARD OF COUNTY COMMISSIONERS
OF HAMILTON COUNTY, OHIO,
Appellees.

OPINION

(Dated February 18, 1975)

BLACK, J.:

DECISION

The Court finds that the decision of the Hamilton County Board of Zoning Appeals (herein, the Board) as set forth in its resolution of July 3, 1974, is constitutional, legal, not arbitrary, not capricious, reasonable, and supported by the preponderance of substantial, reliable and probative evidence on the whole record, with one exception. The exception is as follows: the Board affirmed the following order of the Building Commissioner:

> "You are hereby ordered to cease the parking of vehicles on the newly constructed parking area immediately; and

> to remove the gravel/rock surfacing of the newly constructed parking area and restore the original grass surface as is practical by May 1, 1974."

The Court finds that the last part of this order which requires the Lahmanns to "restore the original grass surface as is practical" is illegal in that it goes beyond the authority and power granted to the Building Commissioner under the Zoning Resolution. In all other respects, that order of March 21, 1974, is proper, and the decision of the Board is affirmed.

Accordingly, the Court modifies the decision of the Board so that it shall read that the order of the Building Commissioner be and it hereby is affirmed with the exception that the appellant and owner shall not be required to restore the original grass surface. This cause is remanded to the Board with instructions to enter an order consistent with the findings and opinion of this Court.

HISTORY OF THE CASE

This appeal relating to the real estate located at 8100 Cheviot Road, Colerain Township, Hamilton County, is the second appeal from the Board to the Courts under Chapter 2605, Ohio Revised Code. The first appeal raised the question of whether or not the Lahmanns were entitled to a zoning certificate for the non-conforming use of "retail sale of buses." On the basis of the evidence before it in that case, this Court ordered such a zoning certificate for non-conforming use to be issued, and the Court of Appeals affirmed. Reference is to Opinion of June 20, 1973, in No. A-725570 in the Court of Common Pleas, and Decision of November 19, 1973, in Nos. C-73321 and C-73323 in the Court of Appeals.

Thereafter, Non-Conforming Zoning Certificate No. 1607 was issued to the Lahmanns for "use of retail sales of buses." Beginning in December 1973, the Lahmanns made certain physical changes to the south portions of the land (more fully described hereafter). Upon learning of these, the Building Commissioner issued an order to the Lahmanns the substance

of which is quoted above. The appeal from this order to the Board resulted in an affirmance by a majority of 3 to 2, after a full hearing.

FACTUAL BASIS

The transcript filed in this case pursuant to Chapter 2506 reveals that approximately 45 days after the Court of Appeals Decision, the Lahmanns began the construction of a new gravel parking lot in the southern portion of the land. The new construction increased the parking area to a size somewhat more than ten times the size of the parking area at the time the Lahmanns acquired the property. At that time, the paved or graveled parts were approximately 20 feet by 100 feet to the north and 20 feet by 40 feet to the south, or a total of 2,800 feet. The new construction covers the two original parking areas and all of the ground lying between them, as well as other ground to the east thereof. The Lahmanns moved dirt around this portion of the land so as to change the natural slope of the ground surface, which was west-to-east; the newly constructed surface slopes east-to-west, with the east end approximately 6 feet higher than the original ground surface. The approximate size of the total parking area (including the original pieces) is 100 feet by 300 feet, or 30,000 square feet. The dirt was compacted and then covered with crushed rock and gravel so that it has sufficient structural strength to support school buses and other vehicles. The new area can accommodate up to 40 school buses.

The factual basis of the Decision in this case, of necessity, includes those matters forming the factual basis of the decision by this Court in the prior case, as set forth in the Opinion of June 20, 1973. There is included in this case Mr. Lahmann's clear and unequivocal testimony before the Board in the first case that he did not propose to operate school buses from the premises and that he would not store buses thereon; further, that he would abide by the Zoning Resolution. The

factual basis of that decision did not include, and the decision of this Court did not contemplate, changes and alterations to the land and buildings.

RATIONALE

The focus of the first case was entirely on the *use* of land and buildings: whether or not the Lahmanns' use was a continuation of the prior owner's non-conforming use, under Section 151 of the Zoning Resolution. The decision there was that the Lahmanns could continue retail sales, even though the land is located in the "B" residence District.

The question now is how far the owner of a non-conforming use may go in extending or intensifying that use. Two possible limitations are suggested by the record: (1) the continuation of the non-conforming use is limited to the use actually existing at the time of the enactment of the Zoning Resolution; or (2) the continuation of the non-conforming use is limited only by the uses permitted under district regulations for that classification (in this instance, "E" Retail Business). The increase in size and quality of the parking area on Lahmanns' property goes beyond limitation (1), but not limitation (2).

The Court concludes that limitation (1) applies, pursuant to the spirit, design and intent of the Zoning Resolution. Article XV, NON-CONFORMING USES, does not specify limitation (1) in so many words, but a fair interpretation of that Article and the rest of the Zoning Resolution reveals its overall design and intent.

The purpose of the Zoning Resolution is to impose a comprehensive plan on the unincorporated territory of the County in order to secure the most appropriate use of land and to conserve and protect property and property values. The means used is to establish seven districts with regulations governing the uses allowed or prohibited in each of the districts as well as other features of use (height and size of building, lot size, yard size, etc.).

In recognition of the fact that within any one of the districts there would be uses existing at the time the Zoning Resolution was adopted which did not conform to the district in which the property was placed, the Zoning Resolution provides for the continuation of such non-conforming uses, and the change of such use to "another non-conforming use of the same or of a more restricted classification." But there are limitations on that. Under Section 154, unless a variance is granted, "no existing building or premises . . . shall be enlarged, extended, reconstructed, or structurally altered, unless the use thereof is changed to a use permitted in the District in which such building or premises is located." Further, under Section 184.9, a non-conforming *use* or building cannot be extended except by order of the Board, but there are limitations on this type of variance. The Board can grant such only (1) where such extension is necessarily incident to the existing use, (2) when such extension is undertaken within 5 years of the effective date of the Zoning Resolution (that period ended November 16, 1966), and (3) only to the extent that any such extension will not exceed in all 50% of the full area of the building as existing on the effective date of the Zoning Resolution. Also, under Section 153, a non-conforming use can be lost by voluntary discontinuance for two years or more; and under Section 154, a non-conforming building damaged by more than 60% of its reproduction value cannot be restored except with approval of the Board.

The intent of the Board of County Commissioners is clear: the "grandfather" provisions which permit a continuation of non-conforming uses limit that continuation to the uses *as existing* when the Zoning Resolution was enacted. There is *not* to be any "spot zoning" by reason of an existing non-conforming use of such a nature as to permit continuation to any extent and under any and all conditions. On the contrary, a strict and careful control was retained over these abnormal uses.

The use of this portion of the Lahmann property for parking is a violation of the Zoning Resolution; it can be prevented

and enjoined, and the gravel/rock surfacing may be ordered removed, under Article XXIX. The gravel/rock surfacing is a "structure" under Section 31.44, because it is included within that definition: it is "anything constructed . . ., the use of which requires permanent location on the ground." But there is nothing in the Zoning Regulation which requires a violator to restore the original surface, whether grass or otherwise. There may be such a requirement in the County's Building Code when a violator has erected a structure without a permit, or in violation of a permit; but we are not dealing with the Building Code in this case. There is nothing in the Zoning Resolution which requires landowners in "B" Residence District to keep in grass those surfaces of his land not occupied by buildings. Exactly what the landowners must do with the surface of the land after removal of the rock and gravel is a matter not decided at this time by this Court.

APPEARANCES:

Robert F. Dreidame, Esq.
Attorney for Victor A. Lahmann and Margaret Lahmann

Robert W. Worth, Esq.
Assistant Prosecuting Attorney
Attorney for Building Commissioner and
Board of County Commissioners

Raymond H. Hensley, Esq.
Attorney for Intervenors

February 18, 1975

APPENDIX I

RESOLUTION
DENYING APPEAL NO. 6-74

Whereas, Victor A. Lahmann, appellant and owner, on April 9, 1974, filed Appeal No. 6-74 with the Board of Zoning Appeals under Sections 183, 184, 184.1 and 184.2 of the Zoning Resolution seeking a review of an order of the Building Commissioner of the literal enforcement of Section 154 of said Resolution as applied to the property located on the East side of Cheviot Road, 220 feet South of Galbraith Road, Colerain Township, Hamilton County, Ohio, and

Whereas, the Building Commissioner on March 21, 1974, issued an order to remove the parking area recently constructed on the above mentioned premises, and

Whereas, a public hearing was had on said appeal on June 5, 1974, notice of which hearing was given by certified mail to parties in interest and also by publication in a newspaper of general circulation in the county at least ten (10) days before the date of said hearing in accordance with Section 303.15 of the Ohio Revised Code, and

Whereas, Section 154 except as hereinafter provided in Article XVII no existing building or premises devoted to a use not permitted by this Resolution in the District in which such building or premises is located, except where required to do so by law or order shall be enlarged, extended, reconstructed or structurally altered, unless the use thereof is changed to a use permitted in the District in which such building or premises is located.

Whereas, Sections 184 and 184.2 empower this Board to authorize, upon appeal, in specific cases, such variance from the terms of the Zoning Resolution, as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the provisions of the Resolution will result in unnecessary hardship, and so that the spirit of the

Resolution shall be observed and substantial justice done, and

Whereas, Section 185 provides, in exercising the above-mentioned powers, the Board may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from, and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all powers of the Officer from whom the appeal is taken, and

Whereas, no parking area existed prior to the enactment of zoning in Colerain Township (November 16, 1961).

Whereas, the parking area recently constructed on the premises is a structure as defined in Section 31.44, and

Whereas, testimony and evidence presented at the public hearing discloses the fact that eighteen (18) school busses, one (1) small school bus, four (4) panel size trucks and seven (7) conventional type automobiles were parked on the newly constructed parking area, and

Whereas, after careful consideration of all the facts, testimony and evidence presented, it is the consensus of this Board that the construction of the parking area and storage of busses, trucks and other vehicles is in violation of Section 154 of the Zoning Resolution and is contrary to the public interest and adversely affects the preservation of the character of the "B" and "B-2" Residence District in which it is located, and

THEREFORE BE IT RESOLVED, that by virtue of the foregoing, the Board of Zoning Appeals does hereby deny this appeal and the order of the Building Commissioner be and it hereby is affirmed.

Adopted: July 3, 1974

THE VOTE –

Affirmative: Messrs. Schenck, Marino and Kearns
Negative: Messrs. Schumacher and Stagnaro

APPROVED:

JEROME J. BRAY, Secretary

PETER T. MARINO, President

APPENDIX J

PARTIAL LIST OF ASSIGNMENTS OF ERROR IN APPEAL TO COURT OF APPEALS, HAMILTON COUNTY

ASSIGNMENT OF ERROR NO. 13: THE ACTION OF THE COMMON PLEAS COURT IN AFFIRMING THE ACTION OF THE BOARD OF ZONING APPEALS AND THE ACTION OF THE BOARD OF ZONING APPEALS AND THE ACTION OF THE BUILDING COMMISSIONER WERE ALL UNCONSTITUTIONAL, WITHOUT LEGAL AUTHORITY IN LAW, ARBITRARY, CAPRICIOUS, UNREASONABLE AND NOT SUPPORTED BY SUBSTANTIAL, RELIABLE AND PROBATIVE EVIDENCE.

ASSIGNMENT OF ERROR NO. 14: THE ZONING RESOLUTION ITSELF IS UNCONSTITUTIONAL WITHOUT LEGAL BASIS, ARBITRARY, CAPRICIOUS AND UNREASONABLE IF IT IS INTERPRETED TO PERMIT THE ACTION AND THE INTERPRETATIONS PLACED UPON IT BY THE BOARD OF ZONING APPEALS AND THE COMMON PLEAS COURT.

ASSIGNMENT OF ERROR N. 15: THE ACTION OF THE COMMON PLEAS COURT AND THE BOARD OF ZONING APPEALS AND THE BUILDING COMMISSIONER IS IN VIOLATION OF THE FEDERAL CONSTITUTIONAL GUARANTEES GIVEN THIS APPELLANT IN THAT IT DEPRIVES HIM OF HIS RIGHT TO THE EQUAL PROTECTION OF THE LAWS AND IN THAT IT DEPRIVES HIM OF THE USE OF AND TAKES AWAY HIS PROPERTY RIGHTS WITHOUT DUE PROCESS.

In addition to the arguments heretofore made, as they might relate to these assignments of error, we submit that an affirmance of the action of the Common Pleas Court and the Building Commissioner in this case would constitute the taking of appellant's property without due process of law in violation of the Constitutions of the State of Ohio and of the United States. Appellant has a valuable property right in that he owns property possesses a non-conforming use certificate for the operation of a business for the conduct of a retail sale of school buses. This certificate is not limited to any part of the property but covers the entire property.

Armed with that property right, appellant attempted to cover a portion of his property with gravel so that he could place his inventory of buses on a graveled surface rather than on grass or mud. The attempt is being made by the Commissioner (and thus far approved by the Common Pleas Court) to deny him the right to use all of his property for the conduct of his business, even though he holds an unlimited and unrestricted non-conforming use certificate for the entire property, and even though there is not one word of evidence in this case to suggest or contend that any part of this property was not used for business purposes by the prior owner.

The finding by the Common Pleas Court that the graveled area used for the parking of vehicles was not as extensive under the operation of the prior business as it is proposed to be under the present owner and in connection with the operation of the newly authorized retail "E" business is completely irrelevant.

To permit the Building Commissioner to deprive the appellant of the right to use the graveled portion of his property for the conduct of his legitimately authorized business would certainly deprive him of a valuable property right. Moreover, the attempt to order him to remove the gravel which he placed upon his privately owned property (and which does not constitute a nuisance or an interference with the adjoining property owners) is likewise the taking of his property without due process of law.

APPENDIX K

NON-CONFORMING USE CERTIFICATE STILL IN EFFECT

Important Document: Keep with Permanent Property Records.

NUMBER 1607 APRIL 18, 1973

COUNTY OF HAMILTON
DEPARTMENT OF BUILDING INSPECTOR
ZONING CERTIFICATE

PREVIOUS OWNER CARL R. BIBBEE AND ISABEL BIBBEE

This is to certify that the Building Inspector of Hamilton County, Ohio, on this 20th day of December 1973 issued a Zoning Certificate to VICTOR A. LAHMANN AND MARGARET LAHMANN for the USE OF RETAIL SALES OF BUSES (COURT OF APPEALS CASE NOS. C-7332, C-7332), located at 8100 CHEVIOT ROAD, COLERAIN Township, Hamilton County, Ohio.

Such use is a NON-CONFORMING use of the premises according to the Zoning Resolution for the Unincorporated Territory of Hamilton County, Ohio. Stated use is permitted within Article XV, Sec. 151, 152, 153, 154 and 155 of the Resolution, if such shall also conform in other respects to the Resolutions of Hamilton County and the laws of the State of Ohio.

This Certificate must be presented to the Building Inspector if changes in the use or structure are desired as within Article XV, Sec. 154 and/or Sec. 155.

/s/ GLEN O. HAUBROCK
Building Inspector,
Hamilton County, Ohio.

Date December 20, 1973
PAID Dec. 20, 1973
Glenn O. Haubrock, Bldg. Comm.

APPENDIX L

PROPOSITION OF LAW NO. 1 AND QUOTATIONS FROM BRIEF IN SUPREME COURT OF OHIO, SHOWING CONSTITUTIONAL QUESTIONS WERE RAISED

PROPOSITION OF LAW NO. 1: WHERE APPELLANT POSSESSES A VALID NON-CONFORMING USE CERTIFICATE AWARDED TO HIM AS A RESULT OF A FINAL ORDER BY THE COURT OF APPEALS IN A PREVIOUS CASE, AND WHERE THAT NON-CONFORMING USE CERTIFICATE PERMITS HIM TO USE HIS 4.81 ACRE TRACT OF LAND FOR THE RETAIL SALE OF BUSES, WHERE NO LIMITATION IS CONTAINED IN THE NON-CONFORMING USE CERTIFICATE THAT WOULD RESTRICT IN ANY WAY HIS RIGHT TO USE HIS ENTIRE PREMISES, AND WHERE APPELLANT HAS THE ADMITTED RIGHT TO ENLARGE HIS PARKING AREA FOR HIS BUSINESS PURPOSES, THE ACTION OF A BUILDING COMMISSIONER IN DENYING TO APPELLANT THE RIGHT TO PARK HIS PERSONAL AUTOMOBILE OR AUTOMOBILES AND A PART OF HIS INVENTORY OF BUSES ON A GRAVELED PARKING AREA IS PREJUDICIALLY ERRONEOUS AND *UNCONSTITUTIONALLY DEPRIVES APPELLANT OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW.*

• • •

Moreover, to permit the Building Commissioner to deny appellant the right to even park his own automobiles on his own private property which is adjacent to his residence and to deny him the right to park or display part of his inventory on his own private property, *is certainly the taking of his property without due process of law.*

• • •

The point which we have made about the unconstitutional taking of property by the action of the Building Commissioner and its affirmance by the Court of Appeals has been blithely ignored by the Court of Appeals in its decision and opinion.

• • •

The action of the Court violates Article I, Sec. 19 of the Constitution of the State of Ohio and Article XIV, Sec. 1 of the United States Constitution, which guarantees that property shall be held inviolate and guarantees due process and equal protection of the laws.

APPENDIX M

NOTICE OF APPEAL TO COMMON PLEAS COURT

Appeal No. 6-74

(Filed July 12, 1974)

COUNTY OF HAMILTON
BOARD OF ZONING APPEALS

IN RE: APPEAL OF VICTOR A. LAHMANN

To: Board of Zoning Appeals
County of Hamilton
Room 316, Temple Bar Building
Cincinnati, Ohio 45202

The undersigned, Victor A. Lahmann, hereby gives notice of appeal to the Court of Common Pleas of Hamilton County, Ohio, from a ruling or decision made by this Board of Zoning Appeals on July 3, 1974, in Appeal Case No. 6-74, wherein Victor A. Lahmann was the appellant. Appellant had appealed an order issued by the Building Commissioner on March 21, 1974, which decision or order of the Building Commissioner was affirmed by the Board of Zoning Appeals. This action of the Building Commissioner and the affirmance by the Board of Zoning Appeals arbitrarily, unreasonably, illegally, unlawfully, capriciously and *unconstitutionally* would deprive the appellant of his rights to operate his business, and *would take his property without due process of law*. The said Building Commissioner and the said Board of Zoning Appeals did illegally and unlawfully make the following determinations:

• • •

APPENDIX N

DECISION OF COURT OF APPEALS IN PRIOR CASE

IN THE COURT OF APPEALS OF
HAMILTON COUNTY, OHIO

No. C-73321 and No. C-73323

In Re: Board of Zoning Appeals,
County of Hamilton,
Appeal of Victor A. Lehmann.

DECISION

(Rendered on November 19, 1973.)

WENDT, P. J., sitting by assignment.

This appeal is third in a series of appeals from the Hamilton County Building Commissioner's denial of an application for a zoning certificate permitting a change in the use of a parcel of land from that of the operation of a retail nursery store to use in the retail sale of school buses. The County Board of Zoning Appeals sustained the Commissioner's denial. On appeal, the Court of Common Pleas reversed the Board and ordered the Board to permit the premises to be used for the retail sale of buses.

In 1971 the appellee, Victor A. Lahmann, acquired nearly five acres of improved real estate in Hamilton County, intending to use such premises in the sale of school buses. The prior owner had used the premises for many years in part for his residence and in part in operating a retail nursery business in which he sold a few trees, shrubs, plants, and various nursery products. His retail business was neither intensive nor extensive. While the property is located within a "B" Residence district,

it is undisputed this retail nursery business was an authorized nonconforming use under the Zoning Resolution, it being a Retail "E" operation within the meaning of the Resolution.

On or about April 18, 1972, Lahmann made application to the Department of Building Inspector for a permit to use his property for the "Retail Sale of Buses" and "Erection of Sign on Building." As has been stated, this application was denied by both the Building Inspector or Commissioner and the County Board of Zoning Appeals. Said authorities were thereafter reversed by the Court of Common Pleas.

• • •

Had the Court of Common Pleas made such a finding, we might be inclined to concur with appellants, but such assignment of error is deduced from an erroneous major premise, as Judge Black of the Common Please Court succinctly demonstrated in his opinion. The zoning restriction relates to the type of use made of the land and buildings. Lahmann, if he wished to do so, could use his property for conducting retail nursery sales to the same extent and in the same manner as the prior owner was permitted. Although the prior owner did very little business, the zoning restrictions in no way limited the size or number of retail sales that could be made. Had he chosen to do so, the prior owner could have augmented his sales without thereby violating zoning limitations. Lahmann succeeded to the same rights, for Article XV, Section 151, of the Hamilton County Zoning Resolution provides:

> "§ 151. The lawful use of any dwelling, building or structure and of any land or premises as existing and lawful at the time of enactment of this Resolution or amendment thereto, may be continued although such does not conform with the provisions of this Resolution or amendment. If no structural alterations are made, a nonconforming use of a building may be changed to another nonconforming use of the same or of a more restricted classification. Whenever a nonconforming use has been changed to a more restricted use or to a conforming use,

such use shall not thereafter be changed to a less restricted use."

Under his nonconforming authority the prior owner could have made retail sales of any other type of products or merchandise falling within the scope of Retail "E" sales. So could Lahmann, for it is conceded "that the operation of a nursery store and the retail sale of school buses are both Retail "E" operations within the meaning of the Zoning Resolution, and if either were a valid nonconforming use, it could be changed to the other, so long as no extension or expansion was involved."

• • •

Appellants contend Lahmann may blacktop part of the premises and this would be a structural alteration of the premises. First, Lahmann has not asked for permission to blacktop. Only if and when he does so would the question arise as to whether this would be a "structural alteration." Second, the question would be immediately answered by Section 31.45 of the Zoning Resolution, reading:

"§ 31.45. Structural Alterations. Any change in the supporting members of a building, such as bearing walls or partitions, columns, beams or girders, or any increase in the area or cubical contents of the building."

Commenting on Section 154, Judge Black said:

"But the plain and obvious intent of this section is that it governs enlargement and extension of both buildings and premises, and the reconstruction or alteration of buildings but *not* to enlargement or extension of use. In other words, while Section 151 permits a change from one nonconforming use to another nonconforming use within the same classification, Section 154 states that where there is any nonconforming use (whether the first or an additional one), the land cannot be added to nor can the building be enlarged, reconstructed or structurally altered without complying with Section 154."

Lahmann's application being only for a permissive change of nonconforming use and not for an enlargement, extension, reconstructive or structural alteration, appellants' contention must be rejected and appellants' assignment of error held to be without merit.

The judgment of the Court of Common Pleas of Hamilton County, Ohio, is affirmed.

STRAUSBAUGH and REILLY, JJ., concur.

WENDT, P. J., sitting by assignment in the First District Court of Appeals.

STRAUSBAUGH and REILLY, JJ., of the Tenth District Court of Appeals, sitting by assignment in the First District Court of Appeals.

Wendt, J., retired and assigned to active duty under authirty of Section 6(C), Article IV, Constitution.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. 76-1002

VICTOR A. LAHMANN,

Petitioner,

vs.

GLEN HAUBROCK, BUILDING COMMISSIONER
and
BOARD OF COUNTY COMMISSIONERS OF
HAMILTON COUNTY, OHIO,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Ohio

BRIEF FOR RESPONDENTS GLEN HAUBROCK, BUILDING COMMISSIONER AND BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO IN OPPOSITION

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Hamilton County, Ohio

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Counsel for Respondents Glen Haubrock, Building Commissioner and Board of County Commissioners of Hamilton County, Ohio.

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

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BRIEF FOR RESPONDENTS GLEN HAUBROCK, BUILDING COMMISSIONER AND BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

May a state court refuse to apply the doctrine of *res adjudicata* in litigation involving the same parties and the same premises as prior litigation, where the facts and said premises have been so altered that prior decisions are no longer applicable to present conditions?

Is Petitioner being denied the right to equal protection and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISION AND ZONING RESOLUTION

The Fourteenth Amendment to the Constitution of the United States, Section 1.

The Zoning Resolution for the Unincorporated Territory of Hamilton County, Ohio, Sections 151 and 154 (Appendix A).

STATEMENT OF THE CASE

Petitioner's statement of the case is so intermingled with petitioner's own arguments and conclusions, that respondents wish to submit their own statement of the case, as follows:

Petitioner owns 4.81 acres of land and improvements thereon at 8100 Cheviot Road, Hamilton County, Ohio, subject to a non-conforming use certificate (Appendix B) that permits Petitioner to sell buses at retail, even though the property was zoned residence "B". This non-conforming use certificate was issued December 20, 1973 by order of the Court of Appeals for the First Appellate District of Ohio.

Shortly thereafter, Petitioner commenced making certain physical changes to the subject premises by constructing a new graveled parking lot on the southern portion of the land. Such newly constructed area required the changing of grade thereof by approximately six (6) feet in height, and the compaction of dirt and application of crushed rock and gravel of sufficient structural strength to support and accommodate up to forty (40) school buses. When the subject premises was acquired by Petitioner, the paved or graveled portions of the property totalled approximately 2,800 square feet. The newly constructed parking area (including the original parking area),

which is used for the display of from 18 to 30 saleable school buses, now covers approximately 30,000 square feet.

Thereafter, on March 21, 1974, the Building Commissioner of Hamilton County, Ohio, directed to Petitioner the following order with respect to the subject premises:

> "You are hereby ordered to cease the parking of vehicles on the newly constructed parking area immediately; and remove the gravel/rock surfacing of the newly constructed parking area and restore the original grass surface as is practical by May 1, 1974."

This order was appealed to the Board of Zoning Appeals which affirmed. It was then appealed to the Common Pleas Court of Hamilton County, Ohio, which found that the Commissioner had no right to order restoration of the grass surface. It was then appealed to the Court of Appeals of the First Appellate District of Ohio, which held also that the Commissioner had no authority to order removal of the gravel and the rock surfacing. The Court of Appeals affirmed that part of the order which prohibited Petitioner parking vehicles on the newly constructed parking areas. Thereafter, a timely motion to certify was filed with the Supreme Court of Ohio, which motion was dismissed.

ARGUMENT

THE DOCTRINE OF RES ADJUDICATA IS NOT APPLICABLE TO THE WITHIN APPEAL.

The addition by Petitioner of a 100′ x 300′ display area, which required grading, filling and sufficient surfacing to support a substantial number of school buses, is an enlargement and extension of Petitioner's *premises* subject to his existing non-conforming use, in violation of Section 154 of the Zoning Resolution of Hamilton County, Ohio. (Appendix A) Said Section 154 provides as follows:

> "Except as hereinafter provided in Article XVIII, no *existing* building or *premises* devoted to a use not permitted by this Resolution in the District in which such building or *premises* is located, except when required to do so by law or order, shall be enlarged, extended, reconstructed, or structurally altered, unless the use thereof is changed to a use permitted in the District in which such building or *premises* is located." (Emphasis added)

Further, Section 151 (Appendix A) of the said Zoning Resolution provides, in pertinent part:

> "The lawful use of any dwelling, building or structure and of any *land or premises* as *existing* and lawful at the time of enactment of this Resolution or amendment thereto, may be continued although such use does not conform with the provisions of the Resolution or amendment, • • •" (Emphasis added)

The word "existing" is a key word in the afore-quoted section. Petitioner has the unquestioned right to use his premises to the same *extent* as his predecessor in title used them prior to the enactment of the Zoning Resolution. This is true even though such usage be different in kind, but of the same or more restrictive zoning classification. This is substantially the position taken by the Court of Common Pleas of Hamilton County, Ohio in its first decision on this matter. Further, the

Court of Appeals of the First Appellate District of Ohio, in affirming the Court of Common Pleas did not anticipate the extensive change in the physical use of the subject premises accomplished by the Petitioner. That Court, at page 4 of its Decision in Cases No. C73321 and C73323 (Appendix C), made the following observation in interpreting Section 154 of the Zoning Resolution:

> "This section prohibits both 'building' and 'premises' being 'enlarged, extended, reconstructed, or structurally altered'. Lahmann seeks no such privileges; he seeks only the privilege of selling school buses and erecting a sign. • • •"

That Court's assumption is further evidenced in its conclusory paragraph, which states:

> "Lahmann's application being only for a permissive change of nonconforming use and not for an enlargement, extension, reconstruction or structural alteration, appellants' contention must be rejected and appellants' assignment or error must be held to be without merit."

Petitioner's extension of his non-conforming use by the construction of a 30,000 square foot display area, is violative of not only the *spirit* of the Zoning Resolution as it applies to non-conforming uses, but also violative of the order of the Court of Appeals in the issuance of the non-conforming use certificate.

The Court of Appeals of the First Appellate District of Ohio in its Decision in the second appeals case, No. C-75210 (Appendix D) clearly distinguished between the causes of action in the first and second appeals. The Court, in commenting on Section 154 of the Zoning Resolution, made the following observation:

> "This section prohibits the premises being enlarged or extended. Does Lahmann in the instant case seek such a privilege?

In the previous case, Lahmann sought no such privilege.

In the instant case, he does.

In the present case, we are faced with an extreme enlargement of the parking area that was in use at the time Lahmann purchased the property and at the time of the previous Court of Appeals' decision and mandate to issue a nonconforming certificate for the use of property for the sale at retail of buses. The present parking area is not within the limitations set down by the Court of Appeals in the previous case. Judge Black, in the present case, held that the use of the new construction for parking is a violation of the Zoning Resolution and that the enlargement can be prevented and enjoined and with this, this Court agrees."

For the aforesaid reasons, it is clear that neither the Court of Common Pleas nor the Court of Appeals of Hamilton County, Ohio are bound by the Doctrine of Res Adjudicata to follow the decisions set forth by the Court of Common Pleas and the Court of Appeals in the prior cases. The prior decisions were based upon a specific set of facts existing at that time. Petitioner's extensive alteration of his premises, has altered the fact situation to such a degree that the prior decisions can have no logical application to present conditions. In the case of *Whitehead* v. *General Telephone Co.*, (1969) 20 Ohio St. 2d 108, the Supreme Court of Ohio held that "a final judgment or decree in an action does not bar a subsequent action where the causes of action are not the same, even though each action related to the same subject matter." In the instant situation, both the cause of action and the facts involved in the second appeal are different from those in the prior appeal, even though the same subject matter and the same parties are involved.

Petitioner has cited several cases in support of his position involving the applicability of the Doctrine of Res Adjudicata,

however, all of the cases cited are based upon the proposition that the cause or causes of action and the facts in a subsequent case are virtually the same as in the prior litigated case. Those conditions are not present in the instant matter. Therefore, the cited cases are not applicable.

THE PETITIONER IS NOT BEING DENIED THE RIGHT TO EQUAL PROTECTION AND DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner has raised a constitutional question which is without merit. The right of a governmental unit to impose zoning restrictions has unquestionably been declared to be a proper exercise of police power, and in conformity with the due process safe-guards of the State and Federal Constitutions. Likewise, limitations placed upon uses existing at the time of the establishment of zoning (non-conforming uses) have also been generally deemed to be constitutionally acceptable. In the present case, the petitioner has not lost a valuable property right in the subject premises. He has been merely restricted in the use of said premises to such usage as existed at the time zoning became effective in Colerain Township, Hamilton County, Ohio, such usage being readily apparent to petitioner at the time of his purchase of said promises. Petitioner's non-conforming use certificate does not guarantee him the unlimited and unrestricted use of the subject premises for the retail sale of school buses. Said non-conforming use certificate merely permits petitioner to use said premises for the retail sale of school buses to the extent *existing* and lawful at the time of the enactment of the Zoning Resolution. The 30,000 square foot display area was not in existence at the time of enactment of the Zoning Resolution.

CONCLUSION

There is no substantial constitutional question involved herein. None of the considerations, set forth in Rule 19 of the Rules of this Court, governing review on certiorari, are present in this case. The decisions of the lower courts are clearly correct.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON L. LEIS, JR.
Prosecuting Attorney
Hamilton County, Ohio

RAYMOND C. WETHERELL
Ass't Prosecuting Attorney
Hamilton County, Ohio
Room 420, Court House
Cincinnati, Ohio 45202

Counsel for Respondents Glen Haubrock, Building Commissioner and Board of County Commissioners of Hamilton County, Ohio

APPENDIX A

ZONING RESOLUTION
for the
UNINCORPORATED TERRITORY
of
HAMILTON COUNTY, OHIO

Sec. 151 The lawful use of any dwelling, building or structure and of any land or premises as existing and lawful at the time of enactment of this Resolution or amendment thereto, may be continued although such use does not conform with the provisions of this Resolution or amendment. If no structural alterations are made, a non-conforming use of a building may be changed to another non-conforming use of the same or of a more restricted classification. Whenever a non-conforming use has been changed to a more restricted use or to a conforming use, such use shall not thereafter be changed to a less restricted use.

Sec. 154 Except as hereinafter provided in Article XVIII, no existing building or premises devoted to a use not permitted by this Resolution in the District in which such building or premises is located, except when required to do so by law or order, shall be enlarged, extended, reconstructed, or structurally altered, unless the use thereof is changed to a use permitted in the District in which such building or premises is located.

APPENDIX B

NON-CONFORMING USE CERTIFICATE STILL IN EFFECT

Important Document: Keep with Permanent Property Records.

NUMBER 1607 APRIL 18, 1973

COUNTY OF HAMILTON
DEPARTMENT OF BUILDING INSPECTOR
ZONING CERTIFICATE

PREVIOUS OWNER CARL R. BIBBEE AND ISABEL BIBBEE

This is to certify that the Building Inspector of Hamilton County, Ohio, on this 20th day of December 1973 issued a Zoning Certificate to VICTOR A. LAHMANN AND MARGARET LAHMANN for the USE OF RETAIL SALES OF BUSES (COURT OF APPEALS CASE NOS. C-7332, C-7332), located at 8100 CHEVIOT ROAD, COLERAIN Township, Hamilton County, Ohio.

Such use is a NON-CONFORMING use of the premises according to the Zoning Resolution for the Unincorporated Territory of Hamilton County, Ohio. Stated use is permitted within Article XV, Sec. 151, 152, 153, 154 and 155 of the Resolution, if such shall also conform in other respects to the Resolutions of Hamilton County and the laws of the State of Ohio.

This Certificate must be presented to the Building Inspector if changes in the use or structure are desired as within Article XV, Sec. 154 and/or Sec. 155.

/s/ GLEN O. HAUBROCK
Building Inspector,
Hamilton County, Ohio.

Date December 20 ,1973
PAID Dec. 20, 1973
Glenn O. Haubrock, Bldg. Comm.

APPENDIX C

DECISION OF COURT OF APPEALS IN PRIOR CASE

IN THE COURT OF APPEALS OF
HAMILTON COUNTY, OHIO

No. C-73321 and No. C-73323

In Re: Board of Zoning Appeals,
County of Hamilton,
Appeal of Victor A. Lehmann.

DECISION

(Rendered on November 19, 1973.)

WENDT, P. J., sitting by assignment.

This appeal is third in a series of appeals from the Hamilton County Building Commissioner's denial of an application for a zoning certificate permitting a change in the use of a parcel of land from that of the operation of a retail nursery store to use in the retail sale of school buses. The County Board of Zoning Appeals sustained the Commissioner's denial. On appeal, the Court of Common Pleas reversed the Board and ordered the Board to permit the premises to be used for the retail sale of buses.

In 1971 the appellee, Victor A. Lahmann, acquired nearly five acres of improved real estate in Hamilton County, intending to use such premises in the sale of school buses. The prior owner had used the premises for many years in part for his residence and in part in operating a retail nursery business in which he sold a few trees, shrubs, plants, and various nursery products. His retail business was neither intensive nor extensive. While the property is located within a "B" Residence district,

it is undisputed this retail nursery business was an authorized nonconforming use under the Zoning Resolution, it being a Retail "E" operation within the meaning of the Resolution.

On or about April 18, 1972, Lahmann made application to the Department of Building Inspector for a permit to use his property for the "Retail Sale of Buses" and "Erection of Sign on Building." As has been stated, this application was denied by both the Building Inspector or Commissioner and the County Board of Zoning Appeals. Said authorities were thereafter reversed by the Court of Common Pleas.

• • •

Had the Court of Common Pleas made such a finding, we might be inclined to concur with appellants, but such assignment of error is deduced from an erroneous major premise, as Judge Black of the Common Pleas Court succinctly demonstrated in his opinion. The zoning restriction relates to the type of use made of the land and buildings. Lahmann, if he wished to do so, could use his property for conducting retail nursery sales to the same extent and in the same manner as the prior owner was permitted. Although the prior owner did very little business, the zoning restrictions in no way limited the size or number of retail sales that could be made. Had he chosen to do so, the prior owner could have augmented his sales without thereby violating zoning limitations. Lahmann succeeded to the same rights, for Article XV, Section 151, of the Hamilton County Zoning Resolution provides:

> "§ 151. The lawful use of any dwelling, building or structure and of any land or premises as existing and lawful at the time of enactment of this Resolution or amendment thereto, may be continued although such does not conform with the provisions of this Resolution or amendment. If no structural alterations are made, a nonconforming use of a building may be changed to another nonconforming use of the same or of a more restricted classification. Whenever a nonconforming use has been changed to a more restricted use or to a conforming use, such use shall not thereafter be changed to a less restricted use."

Under his nonconforming authority the prior owner could have made retail sales of any other type of products or merchandise falling within the scope of Retail "E" sales. So could Lahmann, for it is conceded "that the operation of a nursery store and the retail sale of school buses are both Retail "E" operations within the meaning of the Zoning Resolution, and if either were a valid nonconforming use, it could be changed to the other, so long as no extension or expansion was involved."

• • •

Appellants contend Lahmann may blacktop part of the premises and this would be a structural alteration of the premises. First, Lahmann has not asked for permission to blacktop. Only if and when he does so would the question arise as to whether this would be a "structural alteration." Second, the question would be immediately answered by Section 31.45 of the Zoning Resolution, reading:

> "§ 31.45. Structural Alterations. Any change in the supporting members of a building, such as bearing walls or partitions, columns, beams or girders, or any increase in the area or cubical contents of the building."

Commenting on Section 154, Judge Black said:

> "But the plain and obvious intent of this section is that it governs enlargement and extension of both buildings and premises, and the reconstruction or alteration of buildings but *not* to enlargement or extension of use. In other words, while Section 151 permits a change from one nonconforming use to another nonconforming use within the same classification, Section 154 states that where there is any nonconforming use (whether the first or an additional one), the land cannot be added to nor can the building be enlarged, reconstructed or structurally altered without complying with Section 154."

Lahmann's application being only for a permissive change of nonconforming, use and not for an enlargement, extension, reconstructive or structural alteration, appellants' contention must be rejected and appellants' assignment of error held to be without merit.

The judgment of the Court of Common Pleas of Hamilton County, Ohio, is affirmed.

STRAUSBAUGH and REILLY, JJ., concur.

WENDT, P. J., sitting by assignment in the First District Court of Appeals.

STRAUSBAUGH and REILLY, JJ., of the Tenth District Court of Appeals, sitting by assignment in the First District Court of Appeals.

WENDT, J., retired and assigned to active duty under authority of Section 6(C), Article IV, Constitution.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX D

IN THE COURT OF APPEALS FOR
HAMILTON COUNTY, OHIO

No. C-75210

IN RE APPEAL OF VICTOR A. LAHMANN,
Plaintiff-Appellant,

vs.

GLEN HAUBROCK,
BUILDING COMMISSIONER

and

BOARD OF COUNTY COMMISSIONERS
OF HAMILTON COUNTY, OHIO,
Defendant-Appellee.

DECISION

(Filed May 17, 1976)

LINDHORST AND DREIDAME
MR. ROBERT F. DREIDAME
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For Plaintiff-Appellant

SIMON L. LEIS, JR. and
ROBERT W. WORTH
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Hamilton County Court House
Cincinnati, Ohio 45202
For Defendant-Appellee

RAYMOND H. HENSLEY
808 2nd National Building
Cincinnati, Ohio 45202
For Intervenors

JOHN J. GREISINGER, J.; Sitting by Assignment.

This is an appeal from a judgment of the Court of Common Pleas of Hamilton County, Ohio, affirming the Order of the Board of Zoning Appeals in the above-entitled case.

The appellant's predecessor in the title owned the five acre tract of land in question, most of which was in grass and a small portion of which was devoted to the retail sale of nursery products. The prior owner used the premises for many years in part for his residence and in part in operating a retail nursery business in which he sold a few trees, shrubs, plants and various nursery products. His retail business was neither intensive nor extensive.

Subsequently, the tract was zoned within a "B" Residence District. It is undisputed that this retail nursery business was an authorized non-conforming use under the Zoning Resolution, it being a retail "E" operation within the meaning of the Zoning Resolution. This was observed by the prior ruling in the previous case by the Court of Appeals.

On or about April 18, 1972, the appellant Lahmann, who had purchased the property, made an application to the Building Commissioner for a permit to use the property for "Retail Sale of Buses" and "Erection of Sign on Building". The application was denied by both the Building Commissioner and the County Board of Zoning Appeals. Said authorities were thereafter reversed by the Common Pleas Court (Judge Black).

The Board of Zoning Appeals prosecuted an appeal to the Court of Appeals of the Hamilton County (Case No. C-73321 and C-73323). The Court of Appeals observed that Lahmann succeeded to the same rights as the prior owner and could

have augmented his sales but, it is to be noted, the Court of Appeals was silent on the question of whether the business could be extended over more of the five acres than was presently used for said retail sale purposes.

Thus arises the question that was presented to the Board of Zoning Appeals and the Common Pleas Court in the present case. Pursuant to the mandate of the Court of Appeals in the first case a Non-Conforming Certificate was issued to Lahmann for the "use of retail sales of buses".

About forty-five (45) days after the Court of Appeals' decision, Lahmann began the construction of a new gravel parking lot in the southerly portion of the land. The new construction increased the parking area to a size of more than ten times the size of the parking area which existed at the time Lahmann acquired the property.

In the construction of the new parking facility, considerable grading took place and the parking area was covered with stone and gravel. The new parking facility was large enough to accommodate many more buses than the parking area would have provided at the time of the original case.

The Building Commissioner and the Zoning Board denied the appellant's right to said newly constructed parking area. The Building Commissioner made the following order in respect of said real estate:

> "You are hereby ordered to cease parking of vehicles on the newly constructed parking area immediately; to remove the gravel/rock surfacing of the newly constructed parking area and to restore the original grass surface as is practical by May 1, 1974"

An appeal from this order was timely taken to the Board of Zoning Appeals, who affirmed the action of the Building Commissioner and denied the appeal of the appellant. A timely notice of the appeal from the ruling of the Zoning Board of Appeals was filed in the Common Pleas Court which rendered an Opinion affirming the action of the Building Commissioner except as to the language restoring the original grass surface.

The appeal was prosecuted to this Court. Judge Black, in the case now before the Court of Appeals in his Opinion stated: "The question now is how far the owner of a non-conforming use may go in extending or intensifying that use." Section 151 of the Hamilton County Zoning Resolution provides in part as follows:

> "The lawful use of any • • • land or premises as existing and lawful at the time of the enactment of this Resolution • • • may be continued although such does not conform with the provisions of the Resolution • • • Whenever a non-conforming use has been changed to a more restricted use or to a conforming use, such shall not thereafter be changed to a less restricted use."

There seems to be no doubt that the appellant could continue to operate the nonconforming use for retail sales of buses on the part of the land that was used by his predecessor for retail sales before the adoption of the Zoning ordinance.

The question remains whether that could be extended.

Section 154

> "Except as hereinafter provided • • • no premises devoted to a use not permitted by this Resolution in the District in which such • • • premises is located shall be enlarged, extended and • • • unless the use thereof is changed to a use permitted in the District in which such • • • premises is located."

This section prohibits the premises being enlarged or extended. Does Lahmann in the instant case seek such a privilege?

In the previous case, Lahmann sought no such privilege.

In the insant case, he does.

In the present case, we are faced with an extreme enlargement or extension of the parking area that was in use at the time Lahmann purchased the property and at the time of the previous Court of Appeals' decision and mandate to issue a nonconforming certificate for the use of property for the

sale at retail of buses. The present parking area is not within the limitations set down by the Court of Appeals in the previous case. Judge Black, in the present case, held that the use of the new construction for parking is a violation of the Zoning Resolution and that the enlargement can be prevented and enjoined and with this, this Court agrees.

58 O. Jur. 2nd, Sec. 63:

However, the gravel and rock surfacing is not a structure as defined in Section 31.45 of the Zoning Resolution and, therefore, the Court had no authority to order its removal and, with the Court's ruling in this respect, we disagree. We do agree, however, with the ruling of the Court that the Building Commissioner and the Board had no authority to order the grass to be replanted in the parking area. Therefore, the ruling of Judge Black in the second case is affirmed as to part and overruled as to part, as indicated.

There are several assignments of error.

Each assignment of error was reviewed by the Court, and, upon review, the following disposition thereof is made:

> *Assignment of error No. 1*: The Court of Common Pleas erred in affirming, even in part, the Resolution of the Board of Zoning Appeals dated July 3, 1974.

As to what has already been said in the foregoing Opinion of this Court, the Court finding that the Common Pleas Court did not err except as to ordering the removal of the gravel and rock and the replanting of the grass.

> *Assignment of Error No. 2*: The Court of Common Pleas erred in determining that the Building Commissioner could order appellant "to cease the parking of vehicles on the newly constructed parking area immediately", where this was on private property and was being used only for a use authorized by a Zoning Certificate.

The Court of Common Pleas did not err in determining that the Building Commissioner could order the appellant

to cease parking vehicles on the newly constructed parking area immediately, as has been already determined in the foregoing Opinion of this Court.

> *Assignment of Error No. 3*: The Court of Common Pleas erred in determining that the Building Commissioner could order appellant to "remove the gravel/rock surface of this newly constructed parking area", where this was on private property and was being used only for use authorized by the Zoning Certificate.

As to the removal of the gravel/rock surfacing, the Court has already ruled that the Common Pleas Court erred but otherwise, as to this Assignment of Error, the Court finds that the Common Pleas Court did not err, as set forth in the Opinion of the Court.

> *Assignment of Error No. 4*: The Court of Common Pleas erred in determining that the placing of loose stone and gravel upon the surface of appellant's land was a "structure" within the meaning of Section 31.44 of the Zoning Resolution governing the zoning of the area in question, and refusing to follow the decision of the same Court of Common Pleas in Case No. A-725570, and in ignoring completely and refusing to follow the clear pronouncement of the Court of Appeals in a previous case involving the same parties, which bore the numbers C-73321 and C-73323 in the Court of Appeals of Hamilton County, Ohio, which decision was rendered by a visiting Court of Appeals.

The ruling on this assignment of error is the same as contained in Assignment of Error #3.

Assignment of Error No. 5: This is covered in the ruling of Assignment of Error No. 4.

Assignment of Error No. 6: The Court finds no error in Assignment of Error No. 6 in that there was no structure or building involved and, therefore, no permit was required.

Assignment of Error No. 7: The Court finds that under the circumstances and the ruling of the Court in this case that there was no prejudice herein involved, as to Assignment of Error No. 7.

Assignment of Error No. 8: The Court finds no error in the ruling of the Court below on Assignment of Error No. 8, as set forth in the foregoing Opinion of this Court.

Assignment of Error No. 9: This Court finds that there was no error in that the Court did not attempt to legislate as claimed.

Assignment of Error No. 10: The Court did not err in respect to Assignment of Error No. 10, as set forth in the foregoing Opinion.

Assignment of Error No. 11: The Court of Common Pleas did not err in this respect as set forth and previously observed that no building or structure was involved and no building permit required.

Assignment of Error No. 12: The Court below did not err in this respect. No such approval was required.

Assignment of Error No. 13: The Court did not err in respect to the error claimed in Assignment of Error No. 13. 58 O.Jur.2d Section 29:

> "Zoning Regulations are adopted and enforced pursuant to police power under which government may enact in the furtherance of public safety, health, morals, or general welfare."

58 O.Jur.2d, Section 33, page 506:

> "The constitutionality of comprehensive zoning was established by the Supreme Court of the United States in Euclid v. Ambler Realty Company, a case which originated in Ohio." *Euclid* v. *Ambler*, 272 U.S. 365.

Assignment of Error No. 14: The Court did not err in re-

gard to Assignment of Error No. 14. The same reasons as given under Assignment of Error No. 13 apply.

Assignment of Error No. 15: The Court finds no error in regard to Assignment of Error No. 15; the same authorities as cited in Assignment of Error Nos. 13 and 14 are applicable.

Assignment of Error No. 16: The Court did not err in Assignment of Error No. 16. This Court finds that the action of the Common Pleas Court in ajrming the Board of Zoning Appeals is supported by evidence and is not contrary to the weight of the evidence.

58 O. Jur., Section 178, page 633:

> "In the absence of evidence that the decision was an abuse of discretion or an act in excess of the power of the board or was unreasonable after all the circumstances, the Board's decision will be upheld."

We find that the Board's decision should be upheld.

Assignment of Error No. 17: The Court finds no error in Assignment of Error No. 17 and that the action of the Common Pleas Court in affirming the ruling of the Board of Zoning Appeals is not contrary to law.

REILLY, J., AND DAHLING, J., CONCUR.

GREISINGER, P. J., RETIRED, AND ASSIGNED TO ACTIVE DUTY UNDER AUTHORITY OF SECTION 6(C), ARTICLE IV, CONSTITUTION.

REILLY J., OF THE TENTH APPELLATE DISTRICT, AND DAHLING, J., OF THE ELEVENTH APPELLATE DISTRICT, SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

PLEASE NOTE:

The Court will place of record its own entry in this case ten (10) days following the release of this Decision.